

[2019] PBRA 85

Application for Reconsideration by Robinson

Application

1. This is an application by Robinson (the Applicant) for reconsideration of the decision of an Oral Hearing Panel on the 19th November 2019 not to direct his release. The Secretary of State has offered no response to the Application.

Background

2. The Applicant is serving a sentence of imprisonment for public protection. His tariff expired in March 2008.

Request for Reconsideration

3. The application for reconsideration is dated 9th December 2019.

Current parole review

4. In November 2018 the Secretary of State referred the Applicant's case to the Parole Board for his 7th review.

The Relevant Law

5. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.
6. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.
7. In **R (on the application of DSD and others) -v- the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

"the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."



This test was set out by Lord Diplock in **CCSU -v- Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

Discussion

8. The function of this Reconsideration Assessment Panel (RAP) is defined and limited by the Parole Board Rules 2019, r28. Its role is restricted to reconsideration of release decisions only and does not extend to recommendations for transfer to open conditions. The grounds on which it may reconsider a release decision are limited to whether the decision is irrational or procedurally unfair.
9. The representations submitted on behalf of the Applicant appear to be focused, at least in part, on the decision by the Oral Hearing Panel (OHP) not to recommend to the Secretary of State that the Applicant should be transferred to open conditions. This RAP has no jurisdiction to reconsider this and will not do so.
10. The representations state that the grounds are: (1) Violation of Article 5(4) ECHR and/or common law procedural fairness; (2) Failure to apply the directions [set out in Prison Service Order 4700] and failing to have any regard to the benefits of the Claimant (sic) of a move to open conditions; (3) Failure to consider Article 8 ECHR considerations and proportionality.
11. As to (1), Article 5(4) provides that "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful*". The Applicant was convicted and sentenced lawfully by a court having jurisdiction to do so. The question for the OHP was not the lawfulness of his detention but whether he met the release test set out in s.28(6)(b) of the Crime (Sentences) Act 1997. As to common law procedural fairness, no example appears within the representations of any act or omission on the part of the OHP which is capable of constituting procedural unfairness.
12. As to (2) this ground relates not to release but to transfer to open conditions and is accordingly not a matter for this RAP. In any event, it appears that the Order cited was withdrawn many years ago, consequent on the repeal of s.32 of the Criminal Justice Act 1991 by s.303 of the Criminal Justice Act 2003.



13. As to (3) Article 8 is concerned with right to respect for private and family life. It has no relevance to this application.
14. The representations conclude by inviting reconsideration *“on the basis of unlawfulness and also irrationality”*. As set out above, this RAP may only reconsider the decision of the OHP as to release and on the basis of irrationality or procedural unfairness.
15. The representations expressly and correctly acknowledge that the OHP was entitled to consider a wide range of evidence, including hearsay and unproven allegations, and to give such weight to the evidence as it determined appropriate. It is also acknowledged that the OHP is entitled to accept or to reject the opinions of professional witnesses. It is, however, submitted that the OHP made multiple errors, thus rendering its decision irrational.
16. The first complaint is that the OHP in reaching its conclusion as to the risk posed by the Applicant placed disproportionate reliance on the evidence of one of his Offender Supervisors which was contrary to the opinions of the other professionals and so *“the carefully reasoned conclusions for the professional witnesseswere simply substituted by the conclusion of the Panel”*.
17. This submission appears to be directed to the OHP’s conclusion as to the risk of reoffending. It is correct that the Decision Letter records that assessment tools based on convicted offending history showed a low risk of reconviction. The Decision Letter goes on, however, to note a high level of unconvicted violence and offending which had been disclosed by the Applicant at a previous oral hearing, meaning that the assessment tools were likely to have produced an underestimate of the Applicant’s risk of future violent and non-violent offending. This is a conclusion, based on rational consideration and assessment of the evidence, which the OHP were plainly entitled to reach.
18. The second complaint is that the OHP took account of evidence of poor custodial behaviour on the part of the Applicant which had not been subject to adjudication. The submission is that for that reason it was not open to the OHP to take these matters into consideration. This submission runs contrary to the correct acknowledgement, above, that the OHP is fully entitled to take into account a wide range of evidence, including unconvicted offending. The submission is plainly ill-founded.
19. The third complaint appears to relate to the OHP’s assessment of risk of serious harm posed by the Applicant, although there seems to be some overlap with the first complaint. Here also the complaint is that the OHP irrationally ignored the views of the professionals.



20. In so far as the complaint relates to risk of serious harm, the Decision Letter clearly records the agreement of the OHP with the risk assessments of the professional witnesses. There is reference in it to the risk assessment tools deployed by the professional witnesses and to the agreement of the OHP with their conclusions: "*The Panel accepts these assessments as an accurate reflection of your risk....*". Far from ignoring the views of the professionals, the OHP gave its full agreement to them.
21. The fourth complaint relates solely to the question of transfer to open conditions and is not a matter for this RAP.
22. The fifth complaint is that the OHP failed to take account of changes affecting the Applicant's risk and instead gave too much importance to static risk factors. It is unclear what changes are referred to in this complaint. It is, however, to be noted that the Decision Letter clearly sets out the Applicant's risk factors, as to which no criticism is made, and goes on to record at some length matters relevant to change which have occurred since the last review, some of them to the Applicant's credit, others of them not.
23. The sixth complaint also relates solely to the question of transfer to open conditions.
24. It follows that the complaints made on behalf of the Applicant are either not within the jurisdiction of this RAP or ill-founded. There is no proper basis on which a finding of irrationality is sustainable, considering the complaints individually and cumulatively.
25. This RAP has not only considered the complaints set out above but also the Decision Letter as a whole. It has been unable to detect any irrationality in this long and carefully considered document.
26. It is also noted that there was complete unanimity between all of the professional witnesses that the Applicant did not meet the release test. In so far as there was disagreement between them, it was on the question of open conditions, not release.
27. Likewise, this RAP has given consideration as to whether there is any basis, other than the matters complained of, to support a finding of procedural unfairness. There is none.

Decision

28. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.




Alistair McCreath
20th December 2019

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